



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 8, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

E. Mark Braden, Esq.
Baker & Hostetler
1050 Connecticut Ave. N.W.
Suite 1100
Washington, DC 20036-5304

RE: MUR 3774
American Defense Foundation

Dear Mr. Braden:

On May 20, 1993, the Federal Election Commission notified your client, the American Defense Foundation, Inc. of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On March 6, 1995, your client was notified that the Commission had received an amendment to the complaint alleging similar violations of the Act. A copy of the complaint and the amendment were forwarded to either you or your client on those dates.

Upon further review of the allegations contained in the complaint, and information supplied by your client, the Commission, on August 1, 1995, found that there is reason to believe the American Defense Foundation, Inc. violated 2 U.S.C. § 441b(a), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Order to Submit Written Answers and Subpoena to Produce Documents must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the Order and Subpoena. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

E. Mark Braden, Esq.
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If your client is interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Dawn Odrowski or Elizabeth Stein, the attorneys assigned to this matter, at (202) 219-3690.

Sincerely,



Lee Ann Elliott
Vice Chairman

Enclosures

Order to Submit Written Answers
Subpoena for Production of Documents
Factual and Legal Analysis

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)
) MUR 3774
)

SUBPOENA TO PRODUCE DOCUMENTS
ORDER TO SUBMIT WRITTEN ANSWERS

TO: Mr. Eugene "Red" McDaniel
American Defense Foundation
1055 N. Fairfax Street
Alexandria, VA 22314

c/o E. Mark Braden, Esq.
Baker & Hostetler
1050 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036-5304

Pursuant to 2 U.S.C. § 437d(a)(1) and (3), and in furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby orders you to submit written answers to the questions attached to this Order and subpoenas you to produce the documents requested on the attachment to this Subpoena. Legible copies which, where applicable, show both sides of the documents may be substituted for originals.

Such answers must be submitted under oath and must be forwarded to the Office of the General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463, along with the requested documents within 30 days of receipt of this Order and Subpoena.

Mr. Eugene "Red" Daniel
American Defense Foundation
MUR 3774
Page 2

WHEREFORE, the Chairman of the Federal Election Commission
has hereunto set his hand in Washington, D.C. on this

7th day of August, 1995.

For the Commission,


Lee Ann Elliott
Vice Chairman

ATTEST:


Marjorie W. Emmons
Secretary to the Commission

Attachments

Interrogatories and Request for Documents

INSTRUCTIONS

In answering the enclosed interrogatories and the request for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

Unless otherwise indicated, the discovery request shall refer to the time period from October 1, 1992 to present.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondent in this action to whom these discovery requests are addressed, including all officers, employees, agents or attorneys thereof.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Volunteer" shall mean any individual who assisted an organization for five hours or more in the course of any week.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, the number of pages comprising the document.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and request for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

INTERROGATORIES AND REQUESTS FOR DOCUMENTS

1. Identify all present or former officers, employees, agents or volunteers of the American Defense Foundation, Inc. ("ADF, Inc.") who have knowledge of the payment of funds to the ADF, Inc. from the National Republican Senatorial Committee ("NRSC"). Provide the title of each individual so identified and describe his or her responsibilities.
2. With regard to the specific payments made to ADF by the NRSC's nonfederal account as listed below:

Date	Amount
10/02/92	\$250,000
11/10/92	30,000
3/12/93	170,000
5/26/93	40,000

For each payment:

- a. Identify the person(s) who solicited the payment, or requested or suggested that it be made.
- b. Identify the person(s) to whom such solicitation, request, or suggestion was made.
- c. Describe the purpose and substance of each communication relating to or referencing the payment, both before and after the payment was made, between any officer, employee, agent or volunteer of the ADF, Inc. and any officer, employee, agent or volunteer of the NRSC. Identify the person(s) who initiated such communication. State the date on which each communication occurred and provide all documents containing, relating to, or referencing each such communication.
- d. Identify and describe the fund into which the payment was deposited.
- e. Describe how each payment was used. Identify the person(s) involved in deciding how to use the payment, and state the bases upon which the person made such decision(s).
- f. State whether any officer, employee, agent or volunteer of the ADF, Inc. directly or indirectly informed any officer, employee, agent or volunteer of the NRSC of any decision regarding the use of any payment. If so, identify the person(s) involved, describe the information provided, and state the date on which such interaction occurred. Provide all documents containing evidence of, relating to, or referencing such information.

3. Identify and provide all documents relating to or referencing the payments listed in Question 2, including, but not limited to check copies (front and back), check stubs, invoices, orders, bank statements, contracts, reports, memoranda, letters, understandings, agreements, in-house correspondence, or plans relating to or referencing the timing, purpose and use of the payments.
4. State the total amount expended by ADF, Inc. or any related organization for the following get-out-the-vote activities or communications in connection with the November 24, 1992 U.S. Senate run-off election in Georgia and the 1993 special and run-off elections for U.S. Senate in Texas.
 - a. phone banks
 - b. radio or television ads
 - c. newspaper or other print ads
 - d. public appearances
 - e. voter identification activity
 - f. voter guides
5. Provide copies of all documents containing, referencing or relating to all get-out-the-vote activities or communications financed or conducted by or on behalf of ADF, Inc. in connection with the November 24, 1992 U.S. Senate run-off election in Georgia and the 1993 special and run-off elections for U.S. Senate in Texas. Such documents include, but are not limited to radio ad scripts, voter guides, media placement orders, invoices, checks, correspondence, contracts, and proposals and all materials distributed by or on behalf of the ADF, Inc. that reference the 1992 general election run-off for U.S. Senate in Georgia and the 1993 special and run-off elections for U.S. Senate in Texas.
6. Provide copies of any video or audio tapes of appearances made by ADF, Inc., or any of its officers, employees or agents in connection with any get-out-the-vote activity for the 1992 general election run-off for U.S. Senate in Georgia and the 1993 special and run-off elections for U.S. Senate in Texas.
7. Provide complete copies of the Form 1990 or 1990EZ tax return, including attachments, filed by the ADF, Inc. for 1992 and 1993.
8. Provide copies of ADF's annual reports for 1992 and 1994.
9. Identify any present or former officers, employees, agents or volunteers of ADF who are or at any time from January 1, 1992 to present were, officers, employees, agents or volunteers of the NRSC or the Coverdell for Senate Committee.

10. With regard to voter registration or voter drive activity conducted by the ADF in 1992 and 1993:
 - a. State when the ADF first undertook such voter registration or get-out-the-vote activity.
 - b. State the source(s) of funding for the ADF's voter drive activity.
 - c. Describe generally how the ADF conducts voter drive activity including voter registration and get-out-the-vote efforts.
 - d. Identify ADF officers, employees, agents or volunteers who assisted or supervised ADF's get-out-the-vote activity conducted in 1992 and 1993.
11. Identify the person(s) who have the most knowledge with respect to your answers to these questions.

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

MUR 3774

RESPONDENT: American Defense Foundation

I. GENERATION OF MATTER

This matter was generated by a complaint received on May 14, 1993, from counsel for the Democratic Senatorial Campaign Committee. The complaint alleges that the National Republican Senatorial Committee ("NRSC") made payments of non-federal funds to four organizations to circumvent the coordinated party expenditure limits of the Act and influence the 1992 Georgia run-off election of United States Senator Paul Coverdell. Respondent American Defense Foundation ("ADF") is one of the four organizations named in the complaint.

Complainant filed an amendment to the complaint on February 22, 1995, alleging that the NRSC and its then Chairman, Senator Phil Gramm, again circumvented the coordinated party expenditure limits of the Act by paying non-federal funds to the National Right to Life Committee ("NRLC") in order to influence the 1994 federal elections of Senator Rick Santorum in Pennsylvania and Senator Rod Grams in Minnesota after nearly exhausting allowable coordinated expenditures in the two states.

Responses to the original complaint and the amendment were received from the ADF. An examination of the complaints and the disclosure reports of the reporting entities reveals a repeated pattern of payments to various organizations by the NRSC's non-federal account in the days and weeks before U.S. Senate

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elections in 1992, 1993 and 1994. In the case of the 1992 and 1994 elections identified in the complaints, these payments were made when the NRSC had nearly exhausted its ability to make expenditures on behalf of its candidates.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

National party committees occupy a special place within the political arena and the Federal Election Campaign Act of 1971, as amended ("the Act"), acknowledges this unique position by providing special mechanisms to allow national party committees an enhanced role within the process. The Act specifically provides that a national party committee or the party's senatorial campaign committee, or both in combination, may make a contribution of \$17,500 to each Senate candidate associated with the party in the year in which the candidate's election is held. 2 U.S.C. § 441a(h). A contribution is defined as "any gift, subscription, loan, advance or deposit of money or anything of value made by an person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). "Anything of value" includes all in-kind contributions, i.e., "the provision of any goods and services without charge. . ." 11 C.F.R. §§ 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

In addition to the \$17,500 contribution limit, the Act also permits national and state party committees to make extensive coordinated expenditures on behalf of candidates for federal office in the general election according to the formula set out

in 2 U.S.C. § 441a(d). Coordinated party expenditures are those made by a national party committee on behalf of a specific candidate but not paid directly to the candidate or committee. The Act defines an "expenditure" as including any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value, made by any person for the purpose of influencing any election for federal office. No candidate or political committee shall knowingly make any expenditure in violation of the provisions of 2 U.S.C. § 441a. 2 U.S.C. § 441a(f).

The coordinated expenditure provision enables political party committees to engage in activity that would otherwise result in a contribution to a candidate, and is the primary mechanism available to national and state party committees to support their candidates. See H.R. Rep. No. 94-1057, 94th Congress, 2d Session 59 (1976). The national and state political party committees may designate the party's senatorial campaign committees as their agent for purposes of making these expenditures. 11 C.F.R. § 110.7(a)(4), see also FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 28-29 (1981). The Act recognizes that parties are partisan organizations whose motivation is to further the goals of the party, and provides that a party, by definition, is incapable of making independent expenditures. See 11 C.F.R. § 110.7(b)(4); Advisory Opinion 1980-119; and FEC v. Colorado Republican Federal Campaign Committee, 1995 WL 372934 *1 (10th Cir. 1995) ("Colorado Republicans"). Hence, expenditures by a party

committee or its designated agent on behalf of a candidate are presumed to be coordinated with the candidate and count towards the coordinated expenditure limits established by 2 U.S.C.

§ 441a(d)(3), regardless of whether the expenditures are actually coordinated with the candidate's campaign.

The national party committee and the senatorial and congressional campaign committees may also conduct generic party activity without such activity resulting in either a contribution or counting towards a coordinated expenditure limit so long as no specific candidate is mentioned. 11 C.F.R. § 106.5(a)(2)(iv). Generic party activity includes voter identification drives, voter registration, get out the vote drives ("GOTV") and any other type of activity that encourages the general public to vote or support candidates of the particular party or associated with a particular issue, without mentioning a specific candidate. Id.

A party committee which finances political activity in connection with both federal and non-federal elections is required to either establish separate federal and non-federal accounts or conduct all activity in accordance with the limitations and prohibitions of the Act. 11 C.F.R.

§ 102.5(a)(1). All disbursements, contributions, expenditures and transfers in connection with any federal election must be made from the committee's federal account. 11 C.F.R.

§ 102.5(a)(1)(i).¹ The Commission has previously held that

1. Where a national party committee conducts activity which is in connection with both federal and non-federal elections, including generic party activity, all disbursements for the shared

where an organization with federal and non-federal accounts appears to have violated 11 C.F.R. § 102.5 by disbursing funds from a non-federal account in connection with a federal election, the committee violated 2 U.S.C. § 441b(a) if the non-federal account contained corporate or labor organization funds at the time of the disbursement. See e.g., MURs 2998, 2160, 3670. If the disbursement is made for the purpose of influencing federal elections it also qualifies as a contribution and is subject to the Act's contribution limits. Multicandidate political committees, including a party's Senate campaign committee, may contribute up to \$5,000 per year to non-candidate political committees. 2 U.S.C. § 441a(a)(2)(C).

The Act also prohibits corporations from making contributions or expenditures in connection with federal elections and prohibits any candidate or committee from knowingly accepting such prohibited contributions or expenditures. 2 U.S.C. § 441b.² In order for the prohibitions

(Footnote 1 continued from previous page)
activity must still be from the federal account or from a separate allocation account established solely to pay allocable expenses. 2 U.S.C. § 106.5(g). The non-federal account must transfer funds to the federal account or an allocation account solely to cover the non-federal share of an allocable cost. Id. A national party Senate committee must allocate to its federal account a minimum of 65% of its administrative and generic voter drive expenses. 11 C.F.R. § 106.5(c)(2).

2. A corporation may, however, establish a separate segregated fund to accept contributions and make expenditures in connection with federal elections. 2 U.S.C. § 441b(b)(2)(C). The corporation then acts as a "connected organization," an organization which is not a political committee but which directly or indirectly establishes, administers or financially supports a political committee. 2 U.S.C. § 431(7); 11 C.F.R. § 100.6(c).

of 2 U.S.C. § 441b to apply to corporate expenditures, however, the Supreme Court in FEC v. Massachusetts Citizens for Life ("MCFL") held that independent corporate expenditures must constitute "express advocacy." 479 U.S. at 248. Thus, a corporation may use its general treasury funds to make independent communications to the general public, including voter registration, GOTV material and phone banks, provided these activities do not expressly advocate the election or defeat of a clearly identified candidate. 11 C.F.R. § 114.4(b).³ However, corporate expenditures for such activities made in cooperation, consultation or concert with a candidate, a candidate's authorized committee or their agents are considered contributions and are thus prohibited by 2 U.S.C. § 441b. See 2 U.S.C. § 441a(a)(7)(B) and proposed Commission revisions to 11 C.F.R. 114.4(d), supra, at footnote 3 (providing that corporate voter drives shall not be coordinated with a candidate, group of candidates or political party). Thus, political party committees cannot use corporations as vehicles

3. The Commission has proposed revisions to its regulations governing corporate voter registration and GOTV drives to clarify that voter registration and GOTV drives aimed at the general public are permitted provided that they do not expressly advocate the election or defeat of a candidate or political party and are not coordinated with a candidate or political party. See proposed revisions to 11 C.F.R. § 114.4(d) contained in Notice of Proposed Rulemaking for Independent Expenditures; Corporate and Labor Organization Expenditures; Proposed Rule, 57 Fed Reg. 33548, 33566 (1992). These provisions were proposed in light of the Supreme Court's ruling in FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) and subsequent cases interpreting that decision. See especially, Faucher v. FEC, 928 F. 2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991)(invalidating the Commission's voter guide regulations at 11 C.F.R. § 114.4(b)(5)).

to make expenditures, which if made by the party itself, would be impermissible under the Act.

The Act also exempts from the definition of expenditure the costs of nonpartisan activity by corporations designed to encourage individuals to vote or register to vote.

2 U.S.C. § 431(9)(B)(ii). The legislative history of the 1979 amendments to the Act suggests that unlike corporations, party committees are not entitled to this exemption. In the 1979 amendments, Congress considered and apparently rejected extending 2 U.S.C. § 431(9)(B)(ii) to payments by party committees for voter drive activities. Instead, Congress passed a limited exemption for voter drives in support of a party's nominees for President and Vice President. See 2 U.S.C.

§ 431(8)(B)(xii) and (9)(B)(ix); S. Rep. No. 319, 96th Cong. 1st Sess. at 9 (1979) at 457 and S.1757, 96th Cong. 1st Sess., reprinted in Legislative History of Federal Election Campaign Act of 1979 (hereinafter "Legislative History") at 457 and S. 1757, 96th Cong. 1st Sess. §§ 101(b)(5) and (c)(4) (1979), reprinted in Legislative History at 503, 506. Hence, a party committee cannot take advantage of an exemption for voter drive activity apparently unavailable to it by giving funds to an entity which does qualify for the exemption.

An organization becomes a political committee pursuant to 2 U.S.C. § 431(4) if it receives contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year. Additionally, the Supreme Court has held that "[t]o fulfill the purpose of the Act [the designation of political

committee] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Buckley v. Valeo, 424 U.S. 1, 79 (1976); MCFL, 479 U.S. 238, 252 n.6 (1986). If an organization meets the "major purpose test" and reaches the requisite contribution/expenditure dollar threshold, it must register with the Commission as a political committee and file periodic reports of receipts and disbursements. 2 U.S.C. §§ 433 and 434.

B. Allegations & Responses

Complaint

On November 24, 1992, pursuant to Georgia state law, a run-off election was held for United States Senate after neither Democratic incumbent Wyche Fowler nor Republican challenger Paul Coverdell received fifty percent of the vote in the regularly scheduled November 3, 1992 general election. Between November 10 and November 18, 1992, after having exhausted their coordinated expenditure limitations,⁴ the NRSC made \$122,000 in payments from their non-federal account to four tax-exempt groups. These payments included \$30,000 given to the American Defense Foundation on November 10, 1992.

The complaint alleges that the NRSC spent this non-federal money to influence the election of Republican Senate candidate Paul Coverdell in the Georgia run-off. Based on the timing of the payments and the fact that the four groups named in the complaint

4. See First General Counsel's Report dated March 23, 1993 in MUR 3708 (NRSC) at page 8.

are "closely tied to and have strongly supported the Republican party over time," the complaint alleges that NRSC knew that the money would be expended on behalf of Coverdell. Since NRSC's nonfederal account contains corporate contributions, the complaint also alleges that by making the payments, the NRSC violated 2 U.S.C. § 441b by using corporate money in connection with a federal election and 2 U.S.C. § 441a by making excessive contributions to the various groups.

Amendment

On February 22, 1995, complainants filed an amendment stating that NRSC again violated the coordinated expenditure limitations of the Act by making \$175,000 in payments from non-federal funds to the NRLC between October 31 and November 4, 1994. The basis for the amendment was a series of statements made to a Washington Post reporter at a February 10, 1995 luncheon by Senator Phil Gramm, the Chairman of the NRSC at the time of the 1992 and 1994 elections. According to a February 12, 1995 Post article, Senator Gramm stated that "I made a decision . . . to provide some money to help activate pro-life voters in some key states where they would be pivotal in the election." (emphasis added). Gramm went on to particularly mention the Senate elections in Minnesota and Pennsylvania. Gramm later contacted the reporter and indicated that his original statement was incorrect and that the reason for the payments was that the NRLC's "message conformed to the Republican message."

Responses

The ADF acknowledges that it was active in the Georgia

run-off race. The ADF, a 501(c)(4) organization which describes its purpose as seeking to inform and educate on issues "including veterans affairs and problems relating to prisoners of war and persons missing in action, and to encourage public dialogue on these issues," acknowledges receiving \$30,000 from the NRSC. In an affidavit attached to the response, Eugene "Red" McDaniel, president of ADF, states that "ADF has conducted and continues to conduct nonpartisan registration and get-out-the-vote drives for military personnel and their families" and that "I did encourage voter turn-out through public appearances and radio advertisements in Georgia as part of ADF's program of encouraging voter participation in the American political process by all military personnel." As evidence of the non-partisan nature of the ADF, the response includes a copy of a 1992 letter sent by the ADF to Ron Brown, the then Chairman of the Democratic National Committee, seeking a meeting to discuss ADF's voter registration and turn-out the vote program. With regard to the funds received from the NRSC, Mr. McDaniel states that ADF "clearly expressed that it would not use these funds to support or oppose any candidate for federal office nor for any partisan political activity." The ADF's response and affidavit do not address whether the NRSC funds were used to finance ADF's get-out-the-vote (GOTV) activities in the Coverdell/Fowler run-off election.

In its response to the amendment, ADF requests it be dismissed from the MUR pointing out that the amendment contains a single reference to it in a footnote "erroneously comparing" NRSC's payments to ADF with its 1994 payments to NRLC.

C. Analysis

As discussed below, a variety of factors including the timing of the payments to the four organizations named in the complaint, NRSC's near exhaustion of coordinated expenditures limits at the time payments were made and the close nature and strategic importance of the races identified in the complaints, support an inference that there may have been a violation of the Act given the information presently available.

On November 24, 1992, three weeks after the November 3, 1992 general election, a Senate run-off election was held in Georgia between Republican Paul Coverdell and Democrat Wyche Fowler. Prior to the general and run-off elections, the NRSC had made direct contributions of \$17,500 and coordinated expenditures of \$535,607 on behalf of Paul Coverdell, the maximum allowed for an election. On November 6, 1992, the NRSC sought an advisory opinion from the Commission to determine whether the NRSC could permissibly make additional coordinated expenditures for the run-off. On November 19, 1992 the Commission advised the NRSC that it had split 3-3 on a draft opinion holding that no additional coordinated expenditures were available. The next day, the NRSC reported making an additional \$535,000 in coordinated expenditures for Coverdell in the run-off. See General Counsel's Report dated March 23, 1993 in MUR 3708 at 8, n. 5 and 6.

On November 10, 1992, while awaiting the Commission's decision regarding the permissibility of additional coordinated expenditures, the NRSC made a payment of \$30,000 to the ADF. At the time the NRSC made the payment, news reports in early November

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1992 quote Coverdell aides as saying the campaign was low on cash in what was expected to be a very close run-off. Additionally, the ADF is reportedly accomplished at turning out the vote for their target issues. See e.g., newsletter attached as Exhibit 10 to the complaint.

ADF acknowledges engaging in voter turn out efforts in the 1992 Georgia election but its president contends that its activities were not targeted at specific candidates or parties. ADF's response fails to specify the timing of its GOTV activities. However, a November 21, 1992 Georgia newspaper article attached to the complaint indicates ADF's president was in Georgia "touring military facilities and talking about Tuesday's run-off election" a week after ADF received NRSC's \$30,000 payment. See Exhibit 10 of original complaint. Since ADF is not a reporting entity and has not established a separate segregated fund, it is not possible to ascertain whether NRSC's funds were used to finance ADF's GOTV activities.

Additionally, the NRSC's disclosure reports reveal that in 1992 and 1993, the NRSC had an established pattern of making contributions to the ADF and to other groups from its non-federal account in proximity to Senate elections. The ADF received \$250,000 prior to the 1992 general election, \$30,000 prior to the 1992 run-off, and \$210,000 in the months prior to the May 1993 special Texas Senate election and June 1993 Senate run-off,⁵ for a total of \$490,000. In fact, since January 1991 when the NRSC's

5. Of the \$210,00 paid to ADF prior to the special Senate election in Texas, NRSC's non-federal reports describe the purpose of a \$170,000 payment as "party building."

non-federal account was first required to file reports, all but two of about fifteen donations to non-profit groups were made to the four organizations named in this matter between four days and two months preceding U.S. Senate elections.

With regard to the funds received from the NRSC, Mr. McDaniel states that ADF "clearly expressed that it would not use these funds to support or oppose any candidate for federal office nor for any partisan political activity." However, ADF's responses fail to make clear the circumstances surrounding the receipt and use of NRSC funds. Specifically, the responses fail to indicate whether the funds were solicited from the NRSC or whether there was any understanding between ADF and the NRSC as to how the funds would be spent beyond the boiler-plate statement in a transmittal letter that NRSC says accompanied each such donation which stated that the using the funds to influence a federal election was strictly prohibited. Most notably, ADF's response does not state how the funds were used. ADF's assertion that it expressly stated it would not use the funds to support or oppose any candidate, like the boiler-plate disclaimer in NRSC's transmittal letter does not adequately refute the possibility that the funds were to aid the election of federal candidates given the close proximity of each donation to a United States Senate election. See MCFL, 479 U.S. 238, 249 (1986). Information that is not currently known, including whether or not the payments were solicited, how the payees were chosen, why the payments were made when they were, discussions between the parties, and use of the money, would permit a fuller factual record for assessing whether

the payments were intended to influence specific federal races.

In sum, it appears that the NRSC, after exhausting its own ability to support its candidates, may have given funds to ADF and others to perform GOTV activity on behalf of a specific federal candidate in a targeted race without using funds subject to the Act. See 2 U.S.C. §§ 441a(d), 441a(f), 441b(a) and 11 C.F.R. § 102.5(a)(1).

By virtue of its close relationship with its candidates, political party committees are considered incapable of making independent expenditures. 11 C.F.R. § 110.7(b)(4). Therefore, all expenditures made by the NRSC in connection with the general election of an identified candidate are treated as coordinated expenditures. FEC v. Colorado Republicans, 1995 WL 372934 (10th Cir. 1995). Had the NRSC conducted GOTV activity aimed at specific federal candidates, expenditures for those activities would be treated as coordinated expenditures subject to the applicable Section 441a(d) limit. Instead, it appears from the timing of the payments and the close nature and strategic importance of the races that the NRSC may have made payments to ADF to conduct GOTV activity, and possibly other federal election activity that the NRSC could not have undertaken itself without exceeding the Act's limits.

If the NRSC made payments to ADF in violation of 2 U.S.C. §§ 441a(f) and 441b, the spending of NRSC's funds necessarily has implications for ADF. If ADF accepted payments from the NRSC which constituted coordinated expenditures and used them in connection with a specific election, ADF would have effectively

coordinated GOTV activities with the candidates, through NRSC, and benefited both the NRSC and the Republican Senate candidate whose race was targeted in the activities. As ADF is a corporation, any expenditures made by ADF with regard to GOTV activity mentioning the Republican Senate candidates in targeted states, may have constituted prohibited in-kind corporate contributions to the NRSC, the candidate, or both.

The ADF admits having engaged in GOTV activities but contends that such activities were non-partisan and entirely legal. See e.g., 11 C.F.R. § 114.4(b) and (c). It also admits its president encouraged voter turnout in the 1992 Georgia election through public appearances and radio ads but denies it made expenditures expressly advocating the election of a candidate. However, as it appears that the GOTV activities may have been funded by and coordinated with the NRSC, the expenditures for those activities would constitute in-kind prohibited contributions. See the proposed Commission regulations at 11 C.F.R. §§ 114.2(c) and 114.4(d) at 57 Fed Reg. 33566 (1992) (clarifying that corporations shall not coordinate GOTV drives with any candidate, group of candidates or political party). As such, it would be irrelevant whether or not ADF's GOTV activities contained express advocacy. See also Colorado Republicans, 1995 WL 372934 at *5.

Based on the foregoing, there is reason to believe that the American Defense Foundation violated 2 U.S.C. § 441b(a).